United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

NO. 76-7181

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 76-7181

ALBERT E. McFERRAN, JR., (PRO SE),

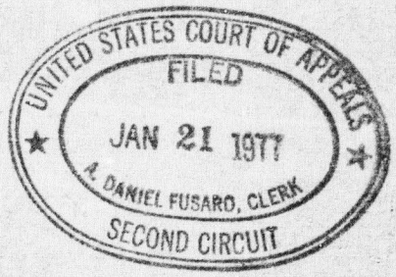
Plaintiff-Appellant,

- against -

BOARD OF EDUCATION FOR THE ENLARGED CITY SCHOOL DISTRICT OF TROY, NEW YORK, and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK



BRIEF FOR DEFENDANT-APPELLEE EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK

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The Issues Presented

In this case, plaintiff-appellant asserted a claim that New York State Education Law § 3020-a, establishing procedures for disciplinary actions against tenured teachers, deprived him of due process of law and was unconstitutional. He sought a declaration of unconstitutionality and an injunction, by a three-judge court, against its application to him.

It appears from papers supplied to the Court by counsel for the defendant Board of Education that plaintiff, a tenured teacher

employed by the Enlarged City School District of Troy, was suspended from his position, with pay, on January 8, 1975, and that charges of incompetence and misconduct were served and filed on May 5, 1975, pursuant to the authority of the defendant Board under Education Law § 3020-a. A hearing panel was established by the defendant State Commissioner of Education on May 15, 1975, and hearings were scheduled to begin on June 11, 1975.

This action was commenced by filing the complaint on May 28, 1975.

Defendants-appellees moved separately, without answering, to dismiss the complaint for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. Prior to such motions being heard, however, plaintiff-appellant entered into a Compromise and Settlement Agreement with the defendant Board of Education, by the terms of which, inter alia, he agreed to withdraw and discontinue the instant proceedings and the disciplinary proceedings against him were discontinued.

Shortly thereafter, plaintiff failed and refused to comply with certain of the obligations imposed upon him by the Agreement, and eventually repudiated it entirely.

When defendants' motions to dismiss came before the District Court, defendant Board of Education submitted the Agreement to the Court as a further bar to the proceeding. Plaintiff argued that he had been misled and coerced by his attorney into signing the Agreement and asked that it be declared invalid and unenforceable.

The District Court (FOLEY, D.J.) granted the motions to dismiss, primarily upon the basis of the Agreement, which he found to have been voluntarily and knowingly made, valid and enforceable. In addition he found no constitutional infirmity in the provisions of Education Law § 3020-a.

ARGUMENT

POINT I

BY REASON OF THE SETTLEMENT AGREEMENT, NO ACTUAL CONTROVERSY EXISTS, AND PLAINTIFF-APPELLANT'S CONSTITUTIONAL ARGUMENTS HAVE BECOME MOOT.

In light of the Compromise and Settlement Agreement this action has become moot, and may no longer be maintained. The maintenance of an action for a declaratory judgment requires the existence of a justiciable controversy between the parties.

This Court in Lecci v. Cahn, 493 F. 2d 826 (1974) vacated a judgment on appeal and dismissed the complaint upon two distinct principles which are applicable in the present case. First, the Court held that since the named plaintiff was a retired policeman, he had no standing to maintain a declaratory judgment action challenging the constitutionality of a section of the New York State Election Law which prohibits political activity by a police officer. Judge MULLIGAN wrote:

> "We do not reach the merits of this appeal since it is abundantly clear that the court below had no jurisdiction to issue the declaratory judgment. It is basic that no federal court 'has "jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies."' Golden v. Zwickler, 394 U.S. 103, 110 (1969) (emphasis omitted)."

The Court held further that plaintiff, having entered into a stipulation, with the aid of counsel, to seek a declaration of constitutionality in State courts, was bound by that stipulation and precluded from returning to the District Court after the Court of Appeals had declared the statute constitutional.

In the stipulation before this Court, the parties not only terminated the statutory proceeding under section 3020-a, but also agreed that this very litigation would be discontinued (see Defts. Exh. I, par. 4).

In the present case, of course, the District Court had acquired jurisdiction before the Compromise and Settlement Agreement was executed, and it was entirely appropriate for the Court to render its decision, disposing of the issues before it, including the legal effect of the Agreement.

POINT II

PLAINTIFF-APPELLANT HAS FAILED TO RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

The due process defects in procedures under section 3020-a, found by the Western District of New York in Kinsella v. Board of Education, 378 F. Supp. 54 (1974), have been effectively remedied by an amendment to the regulations of the Commissioner of Education. (Jerry v. Bd. of Education, 44 A D 2d 198, 206, mod. other ground 35 N Y 2d 534 [1974]; Kinsella v. Bd. of Education, 402 F. Supp. 1155 [W.D.N.Y., October 21, 1975].)

Plaintiff contends that section 3020-a violates his constitutional rights to due process in various ways; particularly, he contends (1) that it authorizes his suspension prior to a hearing, (2) that he will not be heard by the Board of Education, which makes the ultimate decision, and (3) that the Board of Education which authorized the prosecution of charges against him will also determine those charges upon the report of the hearing panel.

The claim that suspension on charges prior to a hearing violates an employee's right to due process has been conclusively laid to rest by the United States Supreme Court in Arnett v. Kennedy, 416 U.S. 134 (1974). In fact, we submit, Arnett effectively determines all of plaintiff's various complaints as to the constitutionality of Education Law § 3020-a (Kinsella v. Bd. of Education, supra, 402 F. Supp. 1155; see also Pordum v. Board of Regents, 491 F. 2d 1281 [2d Cir., 1974], cert. den. 419 U.S. 843.

Plaintiff's claims of bias on the part of the Board of Education, presumably because they authorized the filing of charges, are not only premature, absent a final determination, but without substance as a constitutional defect in any case. (Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456 [1974]; Simard v. Bd. of Education, 473 F. 2d 988 [2d Cir., 1972]; Swab v. Cedar Rapids C.S.D., 494 F. 2d 353 [1974]; Buffalo Teachers Federation v. Helsby, 35 A D 2d 318, app. dsmd. 28 N Y 2d 485, 29 N Y 2d 649 [1970].)

Finally, as to the claim that the charges are not actually heard by the Board, but by a hearing panel designated by the Commissioner of Education, see Matter of Jerry v. Bd. of Education, 50 A D 2d 149 (4th Dept., 1975).

In rejecting such a claim, Justice GOLDMAN wrote in Jerry at p. 161:

> "Aside from the now-cured Kinsella objections, petitioner contends that section 3020-a denies due process because 'the hearing provided for therein does not take place before the ultimate and/or actual decision maker'. In proceedings as formal as those required by section 3020-a, the requirements of due process are satisfied if the ultimate decision maker considers and bases his determination on the legally produced evidence (Matter of Varian v. Commissioner of Internal Revenue, 396 F. 2d 753, 754-755, cert. den. 393 U.S. 962; cf. Morgan v. United States, 298 U.S. 468, 479-482)."

CONCLUSION

THE ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE COMPLAINT SHOULD BE AFFIRMED.

Dated: January 19, 1977

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Albert E. McFerran, Jr.

vs.

Board of Education for the Enlarged City School District of Troy, et al.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith, being duly sworn, says:

I am over eighteen years of age and a typist in the office of the Attorney General of the State of New York, attorney for the defendant-appellee herein.

On the 19th day of January 1977 I served the annexed brief upon the ~~attorney~~ person named below, by depositing two copies thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said ~~attorney~~ person at the address within the State respectively theretofore designated by him for that purpose as follows:

Albert E. McFerran, Jr., Pro Se
131 Clermont Street
Albany, New York

Beverly J. Smith

Sworn to before me this
19th day of January 1977

James A. Economides

JAMES A. ECONOMIDES
Notary Public, State of New York
Residing in Albany County
Commission Expires March 30, 1978